

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES LEE BROWN,

Defendant-Appellant.

UNPUBLISHED

February 11, 2000

No. 208607

Livingston Circuit Court

LC No. 96-9480-FH

Before: Talbot, P.J., and Gribbs and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felonious assault, MCL 750.82; MSA 28.277, reckless handling of a firearm, MCL 752.863a; MSA 28.436(24), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to serve concurrent prison terms of 2 to 4 years on the assault conviction and 90 days on the reckless handling of a firearm charge, preceded by the mandatory two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first argues that he was denied his right to a speedy trial. Initially, we note that defendant failed to raise this issue below. An issue raised for the first time on appeal is not properly preserved. *People v Newcomb*, 190 Mich App 424, 431; 476 NW2d 749 (1991). Nevertheless, this Court may choose to consider an important constitutional question despite the absence of a challenge in the trial court. *People v Gezelman (On Rehearing)*, 202 Mich App 172, 174; 507 NW2d 744 (1993).

The right to a speedy trial is guaranteed to criminal defendants by the federal and Michigan constitutions as well as by statute. US Const, Am VI; Const 1963, art 1, § 20; MCL 768.1; MSA 28.1024. To determine whether a defendant has been denied his right to a speedy trial, this Court must balance the following factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of the right to a speedy trial, and (4) any prejudice to the defendant. *People v Wickham*, 200 Mich App 106, 109; 503 NW2d 701 (1993).

In this case, the total delay between defendant's arrest on August 15, 1996, and the start of

defendant's trial on October 7, 1997, was thirteen months, twenty-two days. Even assuming *arguendo* that the other factors favor defendant, because the delay in bringing him to trial was less than eighteen months, defendant must prove that he was prejudiced by the delay. *People v Daniel*, 207 Mich App 47, 51; 523 NW2d 830 (1994).

The speedy trial guarantee protects three interests of defendant: (1) to prevent oppressive pretrial incarceration; (2) to minimize anxiety and concern of the accused; and (3) to limit the possibility that the defense will be impaired. *Barker v Wingo*, 407 US 514; 92 S Ct 2182; 33 L Ed 2d 101 (1972). The last of these interests is the most serious. *People v Simpson*, 207 Mich App 560, 563; 526 NW2d 33 (1994).

In this case, defendant was incarcerated throughout the entire period from arrest to trial and has thus shown some amount of prejudice. Pretrial incarceration is always 'prejudicial' in that the accused is denied many of his civil liberties. *People v Ovegian*, 106 Mich App 279, 284; 307 NW2d 472 (1981) (citing *Barker, supra*, 407 US 532).

However, defendant also argues that his defense was prejudiced by such incarceration. In doing so, defendant notes that at a hearing held August 19, 1997, counsel for defendant indicated to the court that defendant sought to aid in his defense by performing his own legal research. Apparently, although the Livingston County Jail possessed the materials to allow defendant to do so, he was being denied access to those materials by jail officials. Counsel for defendant requested that the court intervene and require that defendant be given access to the requested materials. The court declined to intervene without first holding an evidentiary hearing on the matter, and informed counsel that a hearing would be granted on short notice if counsel chose to schedule one. No hearing was ever sought by defense counsel and thus we conclude that defendant has failed to establish how this aspect of his incarceration prejudiced his cause. *Daniel, supra*, 51. Further, very little of the delay in this case can be directly attributed solely to the prosecution. When balanced against the lack of any specific prejudice to defendant's ability to present a defense, we cannot conclude that reversal is required. *People v Rosengren*, 159 Mich App 492, 508; 407 NW2d 391 (1987); *People v Matlock*, 153 Mich App 171, 177; 395 NW2d 274 (1986).

Next, defendant argues that the trial court improperly denied his motion for resentencing. Again, we disagree.

Sentencing in this case took place on November 6, 1997. At that time, the trial court determined that the sentencing information report (SIR), when properly scored, placed defendant within a maximum minimum sentence range of zero to twelve months' incarceration for his felonious assault conviction. In sentencing defendant, however, the court departed from the guidelines' recommended range and sentenced defendant to a term of twenty-four to forty-eight months. In doing so, the court neglected to articulate for the record its reasons for guidelines departure, and further neglected to complete the required SIR departure evaluation form. When imposing sentence, however, the court did note that the assault of which defendant was convicted was perpetrated in violation of personal protection orders prohibiting contact with one of his victims. The court further indicated its belief that defendant had a dangerous fixation with this victim, and that the situation created by defendant could

have easily resulted in someone being seriously injured or even killed. After making these remarks, the court pronounced sentence. On March 31, 1998, defendant's appellate counsel moved for resentencing on the basis of the trial court's failure to specify its reasons for departure by placing those reasons on the record and filing an SIR departure evaluation form. After receipt of defendant's motion the trial court filed a completed SIR departure evaluation form, dated April 15, 1998, indicating its reasons for departure as follows:

Defendant has been involved in a nasty divorce and has persistently violated PPOs, showing contempt for the orders of this Court. He was acquitted of one Felonious Assault (with a branding iron) and then became involved again, this time with a gun. These offenses took place at the marital home after he was ordered to stay away from the residence and his family.

At the hearing on defendant's motion for resentencing, held July 2, 1998, the court adopted these statements for purposes of a record articulation of departure rationale and denied defendant's motion.

In *People v Kreger*, 214 Mich App 549, 554-555; 543 NW2d 55 (1995), this Court, noted that the purpose of the articulation requirement is not protection of a defendant's rights but rather to aid the courts. A failure to explain a deviation from the guidelines can be harmless error if, as here, the sentence is proportionate and the record indicates that the court was aware of the guidelines. *Id.*

A review of the sentencing transcript indicates that the court was well aware of the guidelines when pronouncing sentence. In fact, before imposing sentence the court specifically noted that the SIR recommended a minimum sentence range of zero to twelve months. In addition, after discussing the SIR with defense counsel the court adjusted the guidelines calculations and completed a revised SIR. The recommended range under the revised SIR remained zero to twelve months; however, the revisions clearly indicate that the court was aware of the guidelines at the time of sentencing.

In light of these facts, the trial court's initial error in failing to specify its intention to depart from the guidelines, as well as its delay in submitting the SIR departure form, was harmless and does not require remand for resentencing of defendant.

Defendant's final argument on appeal is that the trial court's stated reasons for imposing sentence do not justify a doubling of the recommended maximum minimum sentence under the guidelines, and thus the sentence must be found to be disproportionate.

When reviewing challenges to the proportionality of a sentence, this Court is limited to determining whether the lower court abused its discretion by violating the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). A sentence violates the principle of proportionality if it is found to be disproportionate to the seriousness of the offense and the offender. *Id.*, 636.

Defendant's argument on appeal centers on only two aspects of the court's rationale: defendant's repeated violations of the divorce related PPO, and his previous acquittal of assault charges

involving his January 1996 attack upon one of the same victims with a branding iron. Regarding the PPO violations, defendant merely notes that these violations had been addressed by the court in the divorce action without stating the relevance of that fact. However, even assuming previous consideration of the violations in a separate action, a sentencing court may appropriately consider the circumstances surrounding the defendant's criminal behavior. *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985).

As to defendant's previous acquittal, defendant concedes that such consideration is permissible but argues that in this case there was evidence indicating that defendant was in fact innocent of the charges of which he was acquitted. Even assuming this to be true, we are not persuaded that it was error for the court to consider the acquittal when sentencing defendant.

As noted by our Supreme Court in *People v Ewing*, 435 Mich 443, 451; 458 NW2d 880 (1990), an acquittal does not necessarily mean that the defendant did not engage in criminal conduct, but only demonstrates a lack of proof beyond a reasonable doubt. See also *People v Wiggins*, 151 Mich App 622, 625; 390 NW2d 740 (1986). As such, a sentencing court may consider the facts underlying an acquittal where those facts are supported by reliable evidence. *Ewing, supra*, 455; *People v Parr*, 197 Mich App 41, 46; 494 NW2d 768 (1992). In this case the sentencing judge in the instant matter was also the presiding judge at defendant's first trial. Considering that this judge was present throughout both of defendant's trials, and in light of the fact that defendant offers nothing to indicate that the court's conclusions were not based upon reliable evidence, we reject defendant's claim that the trial court improperly considered the circumstances of his acquittal.

A review of the trial court's comments during sentencing indicates that the court was strongly influenced by the deadly potential of the situation created in this offense by defendant. In light of the nature of defendant's actions, when considered in connection with his previous acquittal and repeated acts of contempt for orders of the court, we find no abuse of discretion in the trial court's sentence.

Affirmed.

/s/ Michael J. Talbot
/s/ Roman S. Gibbs
/s/ Patrick M. Meter